Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GRUMMAN TECHNICAL SERVICES, INC., *et al.*,
Petitioners,

v.

ESTATE OF LAMAR ISHEE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an order remanding a case to State court is reviewable by a federal court of appeals where that order was based on discretionary grounds but also includes an extraneous or ambiguous use of the "tag" of 28 U.S.C. § 1447(c).

2. Whether the government contractor defense should be applied to a closely supervised provider of services to the United States Navy, and whether a colorable claim of such a defense is enough to provide jurisdiction in federal court.

PARTIES TO THE PROCEEDING

In addition to Petitioner Grumman Technical Services, Inc. and Respondent Estate of Lamar Ishee, the following were parties to the proceedings in the Fifth Circuit:

McDonnell Douglas Corporation
UNC Aviation Services, Inc.
Jerome A. Kuechmann
Thomas Harden
Edwin E. Gennette
Jerry Fox
Benny Revels
Mark Glasgow
David Callaghan
Grover Miley
Angela N. Ishee, individually and on behalf of Caitlin S. Ishee, a minor child

RULE 29.6 LISTING

Petitioner Grumman Technical Services, Inc., is a subsidiary of Grumman Aerospace Corporation, which is a subsidiary of Grumman Corporation, which is a subsidiary of Northrop Grumman Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Grumman Technical Services, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The per curiam opinions and orders of the United States Court of Appeals for the Fifth Circuit, App. 1a-3a, 12a-16a, are not officially reported. The opinions of the United States District Court for the Southern District of Mississippi, App. 4a-11a, 17a-53a, are not officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 12, 1996. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved include 28 U.S.C. § 1367, 28 U.S.C. § 1442, and 28 U.S.C. § 1447. The relevant portions of these statutes are set forth in the Appendix. App. 54a-55a.

STATEMENT OF THE CASE

A. Factual Background

Respondents are the surviving wife, child and estate of Captain Lamar Ishee ("the Ishees"). Their claim arises out of Captain Ishee's death during a military training flight accident near the runway at Meridian, Mississippi Naval Air Station ("NAS"). App. 19a. On August 26, 1992, while on active duty as a Marine Corps instructor pilot, Captain Ishee was aboard a TA-4J Skyhawk military jet aircraft being flown by Navy Lieutenant Vernon Hill. *Id.* The two men encountered a thunderstorm upon their return to the NAS, and after landing on the runway, the plane began sliding out of control. Lieutenant Hill and Captain Ishee ejected, but Captain Ishee's parachute never completely opened, and he fell to his death. *Id.*

Petitioner Grumman Technical Services, Inc. ("Grumman"), a government contractor, provided organizational level maintenance support for the Navy's TA-4J military aircraft at Meridian NAS. App. 19a-20a. In addition to Grumman, the original defendants also included the manufacturer of the TA-4J aircraft and the ejection seat, McDonnell Douglas Corporation ("MDC"), another maintenance contractor, UNC Aviation Services, Inc. ("UNC"), and several individual employees of Grumman and UNC. *Id.* All of the original corporate defendants were foreign corporations, and all of the individual defendants were Mississippi residents. *Id.* at 21a.

Contracts between Grumman and the United States prescribed the specific procedures the contractor was to follow in the performance and administration of TA-4J

maintenance activities. (R. G17-176).[1] Grumman was required to perform maintenance support services in accordance with the specific provisions of its contract, military specifications, aircraft and engine manuals, and numerous types of government instructions and directives. (R. M807-08). All of Grumman's employees working on the project rendered services in accordance with the directives and regulations of the commanding naval officer at the Meridian NAS. (R. M808). The government exercised control over each and every aspect of Grumman's performance of the government contracts. (R. M806-12). Indeed, Grumman was performing work that had traditionally been performed by enlisted personnel and officers of the United States Navy. The Navy replaced its own maintenance program at Meridian with contractor personnel in 1987. The Grumman and UNC people thus were simply "substitute sailors." (Deposition of Howard H. Pace at 80-81).

B. Proceedings Below

The Ishees filed their original Complaint in the Circuit Court for the First Judicial District of Hinds County, Mississippi, seeking compensatory and punitive damages under the Mississippi wrongful death statute. The defendants were Grumman, MDC, UNC, and several individuals. (R. G186). MDC and Grumman timely filed separate Notices of Removal on July 30, 1993 (they were later consolidated). (R. M1, 202; G1). Grumman based its removal on two jurisdictional grounds: (1) diversity of citizenship (28 U.S.C. § 1332), claiming that the individ-

[1] The record on appeal to the Fifth Circuit consisted of two district court files, one initiated by the filing of the MDC Notice of Removal, the other initiated by the filing of the Grumman Notice of Removal. Citations to the MDC file will appear as "R. M-," and citations to the Grumman file will appear as "R. G-." The district court record also contains the complete transcripts of all depositions taken in this case. The depositions have not been assigned record page numbers, so the citations to the depositions will refer to the actual page numbers of the depositions.

ual managerial defendants had been fraudulently joined and that the Ishee estate was properly resident in Alabama (rather than Mississippi); and (2) federal officer removal (28 U.S.C. § 1442(a)(1)), claiming a government contractor defense. (R. G1-9). The Ishees moved to remand the case to State court. (R. M110). Before the district court ruled on the Ishees' motion, the Ishees and MDC served a joint motion seeking the dismissal (without prejudice) of MDC, as well as the withdrawal of MDC's Notice of Removal. (R. M549). Grumman opposed the dismissal of MDC. App. 31a.

The district court entered its first Opinion and Order on December 15, 1994. App. 17a. On the issue of diversity, the district court did not determine the citizenship of the Ishee Estate or whether the managerial defendants were fraudulently joined. *Id.* The district court did permit the Ishees to file a Second Amended Complaint that added a number of newly identified "Doe" defendants. *Id.* at 26a-27a. The district court concluded that the post-removal identification of the Does "related back" to the date of the filing of the original removal petition and thereby precluded a fraudulent joinder removal. App. 26a-27a.

On the federal officer question, the district court found that Grumman, UNC and Fox (an individual defendant) were not entitled to remove under § 1442(a)(1), because they did not have a colorable claim to a federal defense and no causal nexus existed between the Ishees' allegations and the acts performed under federal authority. App. 40a-51a. MDC, by contrast, was assumed to have a valid claim to § 1442(a)(1) jurisdiction as a "person" acting under a federal officer, and the district court therefore "assumed" that it had subject-matter jurisdiction. *Id.* at 39a.

In addition to granting the plaintiffs leave to file their Second Amended Complaint, the district court granted the joint motion for voluntary dismissal of MDC. App. 39a. The court then found that it had dismissed all claims

over which it had original jurisdiction, and it declined to exercise its supplemental jurisdiction over the remainder of the case. *Id.* at 51a-53a; *see* 28 U.S.C. § 1367. The court then announced: "Pursuant to 28 U.S.C. §1447(c), the Court determines that this action has been 'removed improvidently and without jurisdiction' " and ordered the case remanded to State court. *Id.* at 52a-53a.

Grumman (and others) appealed, and the Fifth Circuit found that the district court had "assumed that at the time of removal it had jurisdiction to hear this case." App. 14a. This presumption of jurisdiction, the Fifth Circuit determined, created supplemental jurisdiction over the nonfederal elements of the case, which the district court declined, in its discretion, and ordered remand. *Id.* at 14a-15a. The Fifth Circuit noted, however, that the district court had stated at the end of its Opinion that it was remanding the case pursuant to 28 U.S.C. § 1447(c), leaving the circuit court unable to determine the basis of the district court's remand order. *Id.* at 15a-16a. Noting that "resolution of this question of jurisdiction at the time of removal is crucial to the determination whether we have appellate jurisdiction to review the remand order," the Fifth Circuit remanded the case to the district court for further proceedings on the "narrow question" of whether MDC had properly removed the case. *Id.*

The district court then issued its second remand order, this time focusing exclusively on the question of whether MDC's removal was proper. App. 4a. The court found that MDC qualified as a "person" under 28 U.S.C. § 1442, *id.* at 5a-6a, and that MDC had raised a colorable federal defense to the plaintiffs' claims. *Id.* at 6a-7a. The district court concluded, however, that MDC had failed to demonstrate that it had "acted under" an officer of the United States. *Id.* at 7a-10a. Without discussing any other grounds for removal, including fraudulent joinder and Grumman's federal officer defense, the district court then

determined that since no other party had properly removed the case, the court had no jurisdiction, and remanded pursuant to § 1447(c). *Id.* at 11a.

The Fifth Circuit found that the district court's holding based on § 1447(c) divested the court of its appellate jurisdiction, and the appeal was dismissed. App. 1a-3a. The case has now been remanded to Mississippi State court.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT IS IN CONFLICT WITH THE FOURTH CIRCUIT ON THE REVIEWABILITY OF REMAND ORDERS.

This case presents an important and unsettled question concerning appellate review of remand orders under this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (finding that only remands based on grounds specified in 28 U.S.C. § 1447(c)[2] are immune from appellate review under § 1447(d)). The result of the Fifth Circuit's rulings in this case is that even where 28 U.S.C. § 1447(c) did not provide the actual basis for the district court's remand order, an inadvertent or extraneous reference to that statute is enough to bar appellate review under 28 U.S.C. § 1447(d). This decision creates an untenable standard for appellate review of remand orders and conflicts with a recent decision of the Fourth Circuit, *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996). In *Mangold*, the court looked beyond the district court's "inadverten[t]" reference to § 1447(c) and accepted appellate review when it was

[2] The language of 1447(c) has changed since *Thermtron*. The current section involves remands based on either a defect in removal procedure or lack of subject-matter jurisdiction, while the prior statute, amended in 1988, involved remand for cases removed "improvidently and without jurisdiction." *See* Judicial Improvements Act of 1988, Pub. L. No. 100-702, § 1009(c), 1988 U.S.C.C.A.N. (102 Stat.) 4642, 4670.

unclear whether the district court's actual basis for remand was lack of subject-matter jurisdiction. *Id.* at 1452-53.

The key issue in these cases is ambiguity, rather than error. It is beyond dispute, as the Fourth Circuit correctly noted, that where a district court unambiguously bases its remand decision upon § 1447(c) an appellate court has no jurisdiction to review the order, even if it is "manifestly, inarguably erroneous." *Mangold*, 77 F.3d at 1450 (citing *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (per curiam)); *see also Briscoe v. Bell*, 432 U.S. 404, 414 n.13 (1977). In both *Mangold* and the present case, however, the district courts explicitly based their decisions to remand on 28 U.S.C. § 1367(c), which, under *Thermtron*, made them reviewable. Only after emphasizing the discretionary nature of their orders did the two district courts refer to § 1447(c). Those allusions to § 1447(c) not only were clearly erroneous on the merits (which was, by itself, unreviewable), they did not constitute the actual basis of the district courts' decisions. The question of whether such ambiguity is reviewable is posed by the conflict between *Mangold* and this case.

The Fifth Circuit's view of this corollary to the *Thermtron* rule can produce absurd results, as the present case demonstrates. With the exception of one reference to § 1447(c) at the end of its 43-page opinion (App. 52a), the district court's initial remand order was based *entirely* on the premise that removal of the case was proper and that the court had jurisdiction (pursuant to MDC's right to remove under § 1442(a)). App. 39a. This was so clear to the district court that it did not deem it necessary to decide Grumman's allegation of federal jurisdiction based on diversity of citizenship. Indeed, the court itself noted that the question before it was whether, pursuant to 28 U.S.C. § 1367, it had discretion to remand the remainder of the case if MDC was dismissed. *Id.* at 34a-35a. In the final section of the Opinion, entitled "Discre-

tionary Jurisdiction," the court stated that it would "decline[] to exercise *continued* jurisdiction over the non-federal elements of this case." *Id.* at 52a (emphasis added). It was in this "Discretionary Jurisdiction" section where the district court also made its unaccountable reference to § 1447(c). *Id.* at 51a-52a.

Despite the district court's clear basis for its holding in § 1367, the Fifth Circuit remanded for clarification as to the grounds for the district court's order. App. 16a. Taking this hint from the Court of Appeals, the district court then found that MDC had not filed a proper notice of removal in the first instance. *Id.* at 10a. Without providing the parties an opportunity to brief the issues, the Fifth Circuit affirmed. *Id.* at 1a-3a.

The facts of the district court's initial remand order in the present case are strikingly similar to those of the remand in *Mangold,* but the conclusion drawn by the Fourth Circuit was precisely the opposite of that reached by the Fifth Circuit. *Mangold* involved an action filed in Virginia State court against a government contractor, Analytic Services, Inc. ("ANSER"), and an Air Force official ("Rooney"), for emotional distress and reputational injury that allegedly arose out of an investigation into charges of misconduct by Colonel Mangold. *Mangold,* 77 F.3d at 1444. Defendant Rooney removed the case to federal court, and the United States was substituted as a defendant for him under the Federal Tort Claims Act.

At the outset of a hearing on defendants' motions for summary judgment, plaintiffs revealed that they had voluntarily dismissed the United States as a defendant. *Id.* at 1451. Finding that there was no federal question remaining, the judge inquired: "Then there is no longer any basis for federal jurisdiction to this, is there?" *Id.* Counsel for ANSER suggested that it was "appropriate" for the court to "retain[] jurisdiction based upon the assertion by the private defendants of a Federal-immunity defense." *Id.* The district court, noting that it was "purely

discretionary with the Court whether to hold on to the case in the posture that it presently is in," asked counsel to proceed to the merits of the immunity claims. *Id.* (emphasis in original). The district court's subsequent written order denied defendants' immunity claim and found that "a determination of whether defendants have met [the state law evidentiary privilege] standard is better left to a Virginia tribunal." *Id.* at 1452. The district court then incongruously—and extraneously—ordered remand "pursuant to 28 U.S.C. § 1447(c)." *Id.*

The Fourth Circuit took up the jurisdictional issue *sua sponte* and found that, the district court's invocation of § 1447(c) notwithstanding, the court of appeals had jurisdiction to consider the remand order. The court determined that there is an important distinction between cases in which § 1447(c) is the actual ground invoked and those in which the district court bases its remand on other authority but nevertheless references § 1447(c):

> [P]owerful policy considerations and persuasive decisional authority support our power—and responsibility—to look past contextually ambiguous allusions and even specific *citations* to § 1447(c) to determine by independent review of the record the actual grounds or basis upon which the district court considered it was empowered to remand. First, it must be the case, as some courts have had the occasion to recognize, that neither the citation of § 1447(c) nor the failure to cite it as presumed authority for a remand is conclusive of the real question: whether one of its two grounds is the actual basis being invoked as authority for remand. *If a review of the record discloses to a reviewing court's satisfaction that, notwithstanding any indications to the contrary, the actual basis upon which the court thought it was empowered to remand was neither of these, § 1447(d) does not bar review.*

Id. at 1450 (citations omitted) (emphasis added and in original).

This argument could be equally applied to the district court's initial remand order in this case. As the Fifth Circuit concluded, "[a]lthough the body of the opinion clearly indicates that the district court assumed that it had jurisdiction over the case and that it remanded the remaining state law claims pursuant to its discretionary authority, the district court states at the end of its opinion that it was remanding the case pursuant to 28 U.S.C. § 1447(c)." App. 15a. Unlike the *Mangold* court, however, the Fifth Circuit chose to handle this ambiguity (in language) by giving the district court another opportunity for error and almost openly suggesting to the district court that it base its second decision on § 1447(c). *Id.* at 15a-16a ("If the district court determines that McDonnell Douglas was unable to remove the case to federal court, the district court does not have jurisdiction over the case and the remand order is unreviewable by this court.").

While this Court established in *Gravitt* that an appellate court must tolerate even clearly erroneous decisions based on § 1447(c), nothing in *Gravitt* or its progeny suggests that the district court should be given a *second* opportunity for error when its first decision is (at best) ambiguous. Indeed, the *Gravitt* rule is already stretched to its logical limits. As Justice Ginsburg recently reiterated, it "'makes little sense' to rest reviewability *vel non* on the tag the trial court elects to place on its ruling." *Things Remembered, Inc. v. Petrarca,* 116 S. Ct. 494, 500 (1995) (Ginsburg, J., concurring) (quoting *Sykes v. Texas Air Corp.,* 834 F.2d 488, 492 (5th Cir. 1987)). Although it is true, as Judge Gee lamented, that reviewability often turns on an "incantation" of § 1447(c) by the district court, *Sykes,* 834 F.2d at 492, ignoring the explicit and actual grounds of the remand order in the face of an ambiguous "incantation" simply pushes the *Gravitt* principle too far.

Important federal interests are at stake in this case, and Grumman has attempted to exercise its right to have such

claims heard in federal court. Indeed, Grumman presented to the district court not only a "colorable" claim to a federal defense (which is all that is required for removal under 28 U.S.C. § 1442(a), *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969)), but, as the discussion in Section II *infra* demonstrates, Grumman presented a clearly *meritorious* claim that it is covered by the government contractor defense. The district court improperly abrogated that right, and the Fifth Circuit declined to review that decision based on the slimmest connection to the *Thermtron* rule: a single, *ambiguous* invocation of § 1447(c). This case is an appropriate vehicle for this Court to consider the proper application of *Thermtron* and to resolve the conflict on this important issue between the Fifth and Fourth Circuits.

II. DENIAL OF GRUMMAN'S REMOVAL UNDER 28 U.S.C. § 1442(a) IMPROPERLY LIMITED APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE AND ERRONEOUSLY EXCLUDED A FEDERAL CONTRACTOR FROM FEDERAL COURT.

Two important and recurring issues are raised by the lower court's remand order, both involving the scope and application of the "government contractor defense," as delineated by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The district court denied Grumman, a military service contractor, the opportunity to have its federal issues—those arising out of its contract with the United States—adjudicated in federal court. This erroneous decision (which was left unreviewed by the Fifth Circuit) raises the underlying issues of whether, as the district court suggests, the government contractor defense is limited exclusively to procurement contracts and whether "independent contractors" are barred from invoking such a defense. Such a cramped reading of *Boyle* cannot be justified by the language or the logic of this Court's decision. The present case provides this Court

with the opportunity to make clear that *Boyle* applies to government service providers such as Grumman and that such providers are entitled to federal jurisdiction under 28 U.S.C. § 1442(a).

As this Court has noted, "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). The Federal Officer Removal Statute guarantees a federal forum both to officers (or agencies) of the United States, and to persons acting under such officers, for "any act under color of such office." 28 U.S.C. § 1442(a)(1). This Court has stated that § 1442(a)(1) should not be given a "narrow, grudging interpretation." *Willingham*, 395 U.S. at 407.

It is well-established that a defendant may remove under § 1442(a)(1) upon establishing: (1) that it is a "person"; (2) that it was acting under the direction of a federal officer; (3) that it has raised a colorable claim to a federal defense; and (4) that a causal nexus exists between the plaintiff's allegations and the acts performed under federal authority. *Mesa v. California*, 489 U.S. 121, 124-34 (1989). As a corporation that contracted to provide services to the United States, Grumman meets each of these tests.

1. As the district court noted, there is a split of authority regarding whether corporations may be considered "persons" under § 1442(a). *See* App. 40a-41a (citing cases). This Court held in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), that the word "persons" in § 1442(a) does not apply to federal agencies, but the Court left open the question of whether the statute applies to corporations. The district court, and the better reasoned opinions, have found that a corporation is a "person" for purposes of the removal statute, because the logic of *International Primate* does not apply to private corporations. *See* App. 42a; *Ryan v. Dow Chem. Co.*, 781

F. Supp. 934, 946 (E.D.N.Y. 1992) (including corporations within the definition of "person" makes the most sense "in light of the purpose of the section read as a whole"); *Peterson v. Blue Cross/Blue Shield of Texas*, 508 F.2d 55, 57 (5th Cir.) (implicitly recognizing that corporations are "persons" under the statute), *cert. denied*, 422 U.S. 1043 (1975). Moreover, 1 U.S.C. § 1 provides that the word "person" includes corporations when used in a federal statute, "unless the context indicates otherwise."

2. The district court also properly held (or at least assumed), that Grumman acted "under the direction of an officer of the United States," and that, in "a general sense, the defendants' activities on the base were under the direction of the federal government." App. 42a. There is little doubt that an entity whose work was controlled by volumes of detailed, step-by-step specifications and overseen by a Navy officer "acted under" a federal official. *See Ryan*, 781 F. Supp. at 947.

3. The district court erred, however, in concluding that Grumman did not raise even a *colorable* claim to a government contractor defense under *Boyle*. This error presents this Court with an opportunity to clarify several important points about the application of the government contractor defense that have caused confusion in lower courts.

First, the district court and others have mistakenly attempted to distinguish the government contractor defense, established in *Boyle*, from the government agency defense, established in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). The district court found that *Boyle* could not "by implication be extended to providers of services to the military," because the government contractor defense applies only to product manufacturers. App. 46a; *see also In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 810-12 (9th Cir. 1992) (holding that *Boyle* defense applies only to contractors supplying the military with equipment); *Amtreco, Inc. v. O.H. Mate-*

rials, Inc., 802 F. Supp. 443, 445 (M.D. Ga. 1992) (finding "no authority" to support the claim that the government contractor defense applies to service providers).

This is clearly wrong. Despite the district and *Amtreco* courts' professed inability to identify authority on this point (App. 46a; 802 F. Supp. at 445), many courts have found no distinction between the government contractor defense and the government agency defense. *See, e.g., Beaver Valley Power Co. v. National Eng'g and Contracting Co.*, 883 F.2d 1210, 1215 n.4 (3d Cir. 1989) (finding no doctrinal distinction between the "government contractor defense" and the "government agency defense"); *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994) (applying the *Boyle* defense to performance contracts); *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400, 422-23 (D.S.C. 1994) (applying *Boyle* to service contracts); *Lamb v. Martin Marietta Energy Systems, Inc.*, 835 F. Supp. 959, 966 n.7 (W.D. Ky. 1993) (finding no reason to limit *Boyle* to procurement contracts since *Boyle* itself was based on *Yearsley*, which concerned a contractor's construction and other performance of work on dams for the government); *Crawford v. National Lead Co.*, 784 F. Supp. 439, 445 n.7 (S.D. Ohio 1989) ("Although the *Boyle* court discussed the government contractor defense within the context of a procurement contract, the defense is viable with regard to performance contracts."). These courts have correctly reasoned that the dispositive issue should be whether there was a "uniquely federal interest in the subject matter of the contract," not whether a procurement or performance contract is involved. *See Richland-Lexington Airport*, 854 F. Supp. at 422.

Moreover, this Court itself has found that the government contractor defense is not limited to product manufacturers. As the *Boyle* majority noted, "the federal interest justifying this holding surely exists as much in procurement contracts as in performance contracts; we see no basis for a distinction." 487 U.S. at 506. This Court

should use this case to reiterate that there is no distinction between the *Boyle* "government contractor" defense and the *Yearsley* "government agency" defense.

Second, the district court's holding that Grumman was not entitled to a federal defense because it was acting as an "independent contractor," App. 49a-51a, was erroneous. The district court relied on *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 740 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988), in concluding that the *Boyle/Yearsley* defense is inapplicable to independent contractors. *Id.* at 47a. This Court has sharply criticized the Eleventh Circuit's formulation of the government contractor defense, *Boyle*, 487 U.S. at 513, and other courts have found—contrary to *Shaw*—that *Boyle* eliminated the distinction between "agents of the United States" and "independent contractors." *See, e.g., Carley v. Wheeled Coach*, 991 F.2d 1117, 1120 (3d Cir.), *cert. denied*, 114 S. Ct. 191 (1993).[3] This Court should use this case to explain that in examining the government contractor defense, the *Shaw* independent contractor analysis is unnecessary and unwarranted.

Third, even if the independent contractor analysis is proper, a contractor as closely supervised by the military as Grumman would clearly meet the criteria for agency. As the district court itself correctly noted, this Court's test for whether an individual or entity is an "independent contractor" is " 'whether its day-to-day operations are supervised by the Federal Government.' " App. 49a (quoting *United States v. Orleans*, 425 U.S. 807, 815 (1976)). The contracts between Grumman and the United States imposed precise specifications directing every facet of contractor conduct at Meridian NAS, from the clothes Grumman employees would wear (R. G37), to how often the waste baskets would be emptied (R.

[3] The Eleventh Circuit itself has recognized the abrogation of *Shaw*. *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1316 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990).

G77). The contracts described exactly what the contractors were required to do, specified the record-keeping and reporting required of them, and identified the Navy and Department of Defense forms they were required to prepare and submit. (R. G77-83). Every maintenance procedure—every turn of the wrench—was described in voluminous maintenance documents provided to Grumman by the Navy and incorporated into its contract. (R. G49 and R. G128-134). The district court does not explain why a contractor subject to such comprehensive government oversight does not meet the *Orleans* test.

The district court's several errors on this point were compounded by the misapplication of the low standard required for removal under 28 U.S.C. § 1442(a)(1). Under that statute, removal is not contingent upon establishing a federal defense on the merits. Rather, those seeking to invoke § 1442(a)(1) removal must raise only a "colorable" claim to a federal defense. *Willingham*, 395 U.S. at 406-07; *see also Mesa*, 489 U.S. at 132-33. There is simply no doubt that Grumman established at least a "colorable" claim to a government contractor defense.

4. The final prong of the *Mesa* test was satisfied in this case because a causal nexus exists between the claims asserted by the Ishees and the acts performed by Grumman under color of federal office. *Mesa*, 489 U.S. at 131-32. As this Court has instructed, a defendant's mere presence at the place of his federal employment is sufficient to satisfy the causal nexus requirement when the claims asserted against the officer arise out of that employment. *See Willingham*, 395 U.S. at 409 (finding the required "causal connection" where petitioners had shown that their only contact with respondent occurred while they were performing their duties).

It is undisputed that the claims asserted against Grumman all relate to the contractual duties owed to the United States government. The causal nexus prong of the *Mesa*

test thus was satisfied, and the district court's conclusion that no causal nexus existed, App. 51a, was clearly erroneous.

The district court's determination that providers of services to the military such as Grumman are not covered by the government contractor defense constitutes a serious misinterpretation of this Court's holdings in *Boyle* and *Yearsley*. Furthermore, the district court's decision barred the door of federal court to a military contractor with important federal rights at stake. This Court should reverse this erroneous decision and establish clearly that the government contractor defense is to be applied, in federal court, to military service contractors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Filed Apr. 12, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60031

LAMAR ISHEE and ANGELA N. ISHEE, individually and on behalf of CAITLIN S. ISHEE, a minor,
Plaintiffs-Appellees,

versus

MCDONNELL DOUGLAS CORPORATION, *et al.*,
Defendants,

MCDONNELL DOUGLAS CORPORATION,
Defendant-Appellee,

and

GRUMMAN AIRCRAFT COMPANY, *et al.*,
Defendants,

versus

GRUMMAN TECHNICAL SERVICES, INC., *et al.*,
Defendants-Appellants.

ANGELA N. ISHEE, Individually and on behalf of Caitlin S. Ishee, a Minor and as Administratrix of the Estate of Lamar Ishee,
Plaintiff-Appellee,

versus

MCDONNELL DOUGLAS CORPORATION, *et al.*,
Defendants,

MCDONNELL DOUGLAS CORPORATION,
Defendant-Appellee,

and

GRUMMAN AIRCRAFT COMPANY, *et al.*,

versus

JERRY KEUCHMAN, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Mississippi
(3:93-CV-474-BrN)

Before REYNALDO G. GARZA, JOLLY, and DUHÉ, Circuit Judges.

PER CURIAM: *

In an earlier unpublished opinion, we remanded this case to the district court for further proceedings on the narrow question whether McDonnell Douglas properly removed the case based on the Federal Officer Removal Statute, 28 U.S.C. § 1442 (the "FORS"). The district court, in an unpublished opinion dated March 27, 1996, determined that McDonnell Douglas was not entitled to remove this case under the FORS. It thus held that it

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*** Pursuant to Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.**

did not have subject matter jurisdiction over the case [1] and remanded it to state court pursuant to 28 U.S.C. § 1447(c).

Because the district court remanded the case to state court under 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction, we do not have appellate jurisdiction to review this order. *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994). The appeal is therefore

DISMISSED.

[1] The district court also relied on its earlier opinion and order dated December 15, 1994, in which it determined that no other party had properly removed the case to federal court.

APPENDIX B

[Filed Mar. 27, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:93-cv-474 (Br) (N)

ESTATE OF LAMAR ISHEE and ANGELA N. ISHEE,
Individually and on behalf of CAITLIN S. ISHEE, a minor,
Plaintiffs

vs.

MCDONNELL DOUGLAS, *et al.*,
Defendants

MEMORANDUM OPINION

This cause is before the Court on remand from the Fifth Circuit Court of Appeals pursuant to its Opinion of November 30, 1995, in cause number 95-60031, directing this Court to determine "whether McDonnell Douglas properly removed the case based on the Federal Officer Removal Statute."

The Federal Officer Removal Statute, Title 28 U.S.C. § 1442, provides, in pertinent part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office . . . .

The Supreme Court, in *Mesa v. California*, 489 U.S. 121, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989), expounded on the requirements of the statute. The removing party must

> (1) be a federal officer or demonstrate that it acted under the direction of a federal officer;
>
> (2) raise a federal defense to the plaintiff's claims; and
>
> (3) demonstrate a causal nexus between the plaintiff's claims and the acts it performed under color of federal office.

Id. 489 U.S. at 124-25, 129-31, 134-35, 109 S.Ct. at 962-63, 965, 967-68.

This Court recently restated the three requirements in the context of a suit against a private corporation:

> First, since defendants are not federal officers, they must be "persons" within the meaning of the statute. Second, they must assert a colorable claim to a federal defense. And third, they must show that they are being sued for acts taken "under color of" or at the direction of the federal officer.

Guillory v. Ree's Contract Service, Inc., 872 F.Supp. 344, 346 (S.D. Miss. 1994) (citing *Akin v. Big Three Indus., Inc.*, 851 F.Supp. 819, 822 (E.D. Tex. 1994), and *Fung v. Abex Corp.*, 816 F.Supp. 569, 571-72 (N.D. Ca. 1992)).

Since McDonnell Douglas Corporation is not a federal officer, it must qualify as a "person" within the meaning of 28 U.S.C. § 1442. This Court has already decided that although the federal courts are split on this issue,

the best-reasoned approach is to treat corporations as "persons" within the meaning of the federal officer removal statute. (See Memorandum Opinion and Order dated December 15, 1994, pp. 28-29). Thus, McDonnell Douglas qualifies as a "person" under the statute.

As to the second requirement, McDonnel Douglas, in its Notice of Removal, asserts that it has two colorable federal defenses: (a) a military contractor defense under federal common law, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988); and (b) "on information and belief," an immunity defense under § 707 of the Defense Production Act, 50 U.S.C. § 2061, *et seq.* Since this Court is considering these defenses as a basis for removal jurisdiction, in response to the plaintiffs' motion to remand, it is unnecessary to determine the merits of the defenses themselves. The Court's analysis is limited to the threshold issue of whether a colorable defense has been raised.

The complaint alleges a cause of action against McDonnell Douglas as designer and manufacturer of a pilot ejection system in a TA-4J Skyhawk aircraft. In *Boyle*, the Supreme Court set forth the elements of the government contractor defense:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Boyle, 108 S.Ct. at 2518.

The defense Production Act, in relevant part, states:

> No person shall be held liable for damages or penalties for any act or failure to act resulting directly or

> indirectly from compliance with a rule, regulation, or order issued pursuant to this Act . . . ."

50 U.S.C. § 2157.

Although it is disputed whether the government contractor defense and the Defense Production Act apply to the plaintiffs' claims in this case, no dispute can exist over their application as colorable defenses. Therefore, McDonnell Douglas has raised a colorable federal defense to the plaintiffs' claims.

The dispositive issue in this case is whether McDonnell Douglas has demonstrated that it was "acting under" an officer of the United States. To prevail, McDonnell Douglas must prove the existence of a nexus between actions for which it is being sued and the activities of the federal official. *Gulati v. Zuckerman*, 723 F.Supp. 353, 358 (E.D. Pa. 1989). The critical question is: To what extent did McDonnell Douglas act under federal direction at the time it was engaged in the conduct now being sued upon? *See Bahrs v. Hughes Aircraft Co.*, 795 F.Supp. 965, 969 (D. Ariz. 1992); *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F.Supp. 841, 844 (S.D. N.Y. 1973).

Most courts which have addressed this issue require "direct and detailed control" by the federal official over the defendant. *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934, 947 (E.D. N.Y. 1992); *Gulati*, 723 F.Supp. at 353; *Guillory*, 872 F.Supp. at 347. As this Court has previously explained:

> The determination whether a defendant was "acting under" a federal officer depends on the "level of official control," *Ryan*, 781 F.Supp. at 948, and perhaps more to the point, whether the defendant acted sufficiently under the direction of a federal officer in the performance of the acts that for the basis of the suit.

Guillory, 872 F.Supp. at 346.

In this Case, McDonnell Douglas, in its Notice of Removal, asserts that it

> was a person acting under officers of the United States Department of Defense. Each alleged act of commission or omission was conducted by McDonnell Douglas under color of office of the Defense Department, and McDonnell Douglas is thus being sued on the basis of actions taken pursuant to federal direction.

(Notice of Removal, p. 3).

Section 142(a)(1) requires that to be removable a suit must be, *inter alia*, against "[a]ny officer of the United States or any agency thereof, or person acting under him." This requirement has been interpreted to include "executive branch officials and persons acting under them." *Good v. Armstrong World Industries, Inc.*, —— F.Supp. ——, 1996 WL 21131 (E.D. Pa. 1996), at 1. Having concluded that McDonnell Douglas qualifies as a "person," the Court must now examine whether McDonnell Douglas was a "person acting under him." The term "him" has been interpreted to refer to an officer of the United States. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 80, 111 S.Ct. 1700, 1706, 114 L.Ed.2d 134 (1991).

McDonnell Douglas makes three assertions regarding "acting under a federal officer": namely, that it was acting (1) "under officers of the United States Department of Defense," (2) "under color of office of the Defense Department," and (3) "pursuant to federal direction." The second and third of these are too general to support a finding that any action was taken pursuant to the direction of a federal officer. The first, though it employs the term "officers," is also deficient.

Removal must be predicated upon a showing that the acts forming the basis of the state action "were performed

pursuant to an officer's direct orders or comprehensive and detailed regulations." *Good,* at 2 (citing *Pack v. AC and S, Inc.,* 838 F.Supp. 1099, 1103; *Ryan,* 781 F.Supp. at 947). By contrast, if the defendant "establishes only that the relevant acts occurred under the general auspices of federal direction then it is not entitled to § 1442(a)(1) removal." *Id.* (citing *Fung,* 816 F.Supp. at 569; *Ryan,* 781 F.Supp. at 947). Thus, McDonnell Douglas must prove that it constructed the pilot ejection system "according to the direct and control of an officer of the United States, rather than at the general direction of an agency or other governmental department." *Id.* (citing *Pack,* 838 F.Supp. at 1103).

McDonnell Douglas has never sought to amend its Notice of Removal, nor has it filed a response to the plaintiffs' Motion to Remand. As discussed in the December 15, 1994, Memorandum Opinion and Order, the plaintiffs and McDonnell Douglas filed a joint motion to dismiss McDonnell Douglas from this action without prejudice. Also as noted in the prior opinion, the Court answers the removal question by looking to the complaint as it existed at the time the petition for removal was filed. *In re Carter,* 618 F.2d 1093, 1101 (5th Cir. 1980). However, the removing party's burden of establishing federal jurisdiction extends beyond the actual filing of the notice of removal (*see Wilson v. Republic Iron & Steel Co.,* 257 U.S. 2, 97, 42 S.Ct. 35, 37, 66 L.Ed. 144 (1921)). Where, as here, the defendant no longer argues for removal, the Court's inquiry is hampered. Further, the removal statute is strictly construed against removal jurisdiction. *Salveson v. Western States Bankcard Ass'n.,* 731 F.2d 1423, 1426 (9th Cir. 1984). In cases where removal is doubtful, the case should be remanded. *Ryan,* 781 F.Supp. at 939; *Roche v. American Red Cross,* 680 F.Supp. 449, 451 (D. Mass. 1988).

The Court also has before it the deposition of William Smith, engineering manager at McDonnell Douglas, of-

fered to the plaintiffs as "the person most knowledgeable about the Federal involvement in the design process." (Smith Deposition, p. 19). Throughout the deposition, Smith refers to the control and direction given by the United States Navy, not the Department of Defense. He specifies the manner in which the Navy exercised supervision and control over construction of the TA-4J Skyhawk aircraft and the pilot ejection system, including contract documents, written specifications, and on-site supervision. However, he does not name a single "officer" of the United States Navy or Department of Defense who directly controlled and supervised the design and manufacture of the pilot ejection system.

The factual assertions in the Smith affidavit support McDonnell Douglas' entitlement to raise the government contractor defense and the Defense Production Act, but they are not sufficient to support jurisdiction under the federal officer removal statute. A "colorable claim" to a federal defense is not an adequate basis for finding that the defendant was "acting under a federal officer." Moreover, McDonnell Douglas has not shown a causal connection between the allegations of the plaintiffs and the conduct it claims was controlled by a federal officer. Neither the notice nor the deposition establishes that a federal officer required the exact design and construction of the pilot ejection system ultimately adopted by McDonnell Douglas, nor that the components that allegedly failed to operate were specifically required by a federal officer.

In conclusion, the allegations of McDonnell Douglas in its notice of removal and in the deposition of William Smith, when taken at face value, are insufficient to show that it acted under an officer of the United States; thus McDonnell Douglas has failed to meet its burden of showing the causal connection required by *Mesa,* and is not entitled to remove this case under the federal officer removal statute.

Having answered the question propounded by the Fifth Circuit, whether McDonnell Douglas properly removed this case based on the Federal Officer Removal Statute, in the negative, the Court refers to its Memorandum Opinion and Order of December 15, 1994, which finds that no other party properly removed the case to this Court. Therefore, the Court does not have jurisdiction over the case, and this action should be remanded to state court pursuant to 28 U.S.C. § 1447(c). In accordance with the Fifth Circuit directive, this Memorandum Opinion shall be filed in this action, and the Clerk of Court shall forward a copy of same to the Fifth Circuit Court of Appeals for further proceedings.

DATED this the 27th day of March, 1996.

/s/ David Bramlette
United States District Judge

APPENDIX C

[Filed Nov. 30, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60031

LAMAR ISHEE, estate of; ANGELA N. ISHEE, Individually and on behalf of Catlin S. Ishee, a minor,
Plaintiffs-Appellees

v.

MCDONNELL DOUGLAS CORPORATION,
Defendant-Appellee

and

GRUMMAN AIRCRAFT COMPANY; UNITED NUCLEAR CONTROLS, INC.; JERRY KEUCHMAN; TOM HARDIN; ED JENNETT; J R BELLOCK,
Defendants

v.

GRUMMAN TECHNICAL SERVICES, INC.; JEROME A KEUCHMAN; THOMAS HARDEN; EDWIN E GENNETTE; JERRY FOX; UNC AVIATION SERVICES, INC.; BENNY REVELS,
Defendants-Appellants

ANGELA N ISHEE, Individually and on Behalf of Caitlin S. Ishee, a Minor and as Administratrix of the Estate of Lamar Ishee,
Plaintiff-Appellee

v.

MCDONNELL DOUGLAS CORPORATION,
Defendant-Appellee

and

GRUMMAN AIRCRAFT COMPANY; UNITED NUCLEAR CONTROLS, INC.; J R BOLLOCK
Defendants

v.

JERRY KEUCHMAN; TOM HARDIN; ED JENNETTE; JERRY FOX; BENNY REVELS,
Defendants-Appellants

Appeal from the United States District Court for the Southern District of Mississippi
(3:93-CV-474BRN)

Before REYNALDO G. GARZA, JOLLY, and DUHÉ, Circuit Judges.

PER CURIAM:*

In this case because the district court pretermitted the question whether McDonnell Douglas could remove the case to federal court based on the Federal Officer Removal Statute, 28 U.S.C. § 1442, the record on appeal is inadequate for this court to make the essential determination whether appellate jurisdiction exists to review the order

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

to remand to state court. Consequently, we must remand the case for an appropriate findings and conclusions on the removal question.

After concluding that it had neither diversity nor federal question jurisdiction over the case, the district court declared, "[T]he Court has jurisdiction only if one or more of the removing defendants is entitled to remove by virtue of the Federal Officer Removal Statute." (Dist.Ct. Op. at 17.) A motion to dismiss McDonnell Douglas, one of the defendants, complicated its inquiry. The plaintiffs and McDonnell Douglas jointly filed the motion to dismiss after removal. Grumman, another of the defendants, opposed the dismissal of McDonnell Douglas and asked the court first to consider the issue of jurisdiction before ruling on the motion to dismiss. (*Id.* at 18.) The court assumed without deciding that McDonnell Douglas properly could remove the case under the Federal Officer Removal Statute:

> Rather than first determining if McDonnell Douglas is entitled to remove . . . the Court will simply assume that McDonnell Douglas is entitled to remove. To require McDonnell Douglas to brief the issue, when it no longer has any interest in doing so, would be unnecessary if the Court decides to grant the motion for voluntary dismissal.

(Dist.Ct.Op. at 26.) The court went on to find that the motion to dismiss McDonnell Douglas was not filed for purposes of "jurisdictional maneuvering" and that dismissal was well-taken. (*Id.* at 27.) Before making this finding, it addressed the concerns of Grumman by again stressing its presumption that removal by McDonnell was proper. (*Id.*)

Thus, the district court assumed that *at the time of removal*, it had jurisdiction to hear this case.[1] This pre-

[1] "It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the

sumption of jurisdiction created supplemental jurisdiction over the nonfederal elements of this case. *IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 158-59 (1982). Supplemental jurisdiction was not eliminated by the dismissal of the party entitled to remove. *Id.* at 159. Consistent with its presumption of jurisdiction over the case, the district court decided to exercise its discretion to decline supplemental jurisdiction and remand the remaining state law claims to state court after the dismissal of McDonnell Douglas as a defendant. (Dist.Ct.Op. at 42.)

Although the body of the opinion clearly indicates that the district court assumed that it had jurisdiction over the case and that it remanded the remaining state law claims pursuant to its discretionary authority, the district court stated at the end of its opinion that it was remanding the case pursuant to 28 U.S.C. § 1447(c). (*Id.* at 42.)[2] Because the district court assumed without deciding that it had jurisdiction at the time of removal and thus had supplemental jurisdiction over the remaining claims, we are unable to determine whether the remand order was based on a lack of subject matter jurisdiction or on its discretionary authority to remand the remaining state law elements of a case over which it had supplemental jurisdiction. The resolution of this question of jurisdiction at the time of removal is crucial to the determination whether we have appellate jurisdiction to review the remand order. If the district court determines that McDonnell Douglas was unable to remove the case to federal court, the district court does not have jurisdiction over the case and the remand order is unreviewable by this

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complaint as it existed at the time the petition for removal was filed." *In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980).

[2] The court used language from a prior version of 28 U.S.C. § 1447(c) in remanding the case: "[T]he court determines that this action has been 'removed improvidently and without jurisdiction,' and it shall be remanded to the Circuit Court . . . ." (*Id.*)

court. *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994). Conversely, if the district court determines that removal was proper, the district court does have jurisdiction and the remand order is reviewable by this court. *Id.*

In the light of the foregoing, we REMAND this case for further proceedings on the narrow question whether McDonnell Douglas properly removed the case based on the Federal Officer Removal Statute.

REMANDED.[3]

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[3] On remand, the remaining defendants will be fully capable of briefing this issue if the district court deems it necessary.

APPENDIX D

[Filed Dec. 19, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:93-cv-474(Br)(N)

ESTATE OF LAMAR ISHEE and ANGELA N. ISHEE,
Individually and on behalf of CAITLIN S. ISHEE, a minor,
Plaintiffs

vs.

MCDONNELL DOUGLAS CORPORATION, *et al.*,
Defendants

MEMORANDUM OPINION AND ORDER

This cause is before the Court on the plaintiffs' motion to remand and motion for leave to file second amended complaint; the plaintiffs' motion for voluntary dismissal of McDonnell Douglas Corporation; a motion to dismiss or for summary judgment filed by defendants Jerry Fox, Benny Revels, and UNC Aviation; and a motion for summary judgment filed by defendants Jerome A. Kuechmann, Thomas W. Harden and Edwin E. Gennette. Having considered the pleadings, motions, responses, and all memoranda and supporting documents submitted by the parties, as well as the applicable law, the Court finds as follows:

Procedural History

The plaintiffs commenced this action in the Circuit Court of Hinds County, Mississippi, for the wrongful death of Captain Lamar R. Ishee, a Marine pilot who was

killed during a military training flight while returning to his home base at Meridian, Mississippi. Named as defendants in the original complaint were McDonnell Douglas Corporation; Grumman Aircraft Company; United Nuclear Controls, Inc.; Jerome A. Kuechmann, Thomas W. Harden and Edwin E. Gennette (employees of Grumman); and Jerry Fox, Benny Revels and J. R. Bollock (employees of UNC). Also named were "John Doe" defendants numbered 1 through 50.

Grumman Technical Services, Inc., removed this action, and advised that it had been incorrectly sued as Grumman Aircraft Company. Grumman Technical Services, Inc., is a Florida corporation which has its principal place of business in Florida. Grumman's removal was premised on grounds of fraudulent joinder and the Federal Officer Removal Statute. McDonnell Douglas also filed a notice of removal. McDonnell Douglas is a Maryland corporation which has its principal place of business in Missouri. Following removal, the plaintiffs filed their first amended complaint naming as an additional defendant Grumman Technical Services, Inc., and substituting UNC Aviation Services, Inc., for the defendant United Nuclear Controls, Inc. UNC then joined in the notices of removal filed on behalf of McDonnell Douglas and Grumman. It listed as grounds for removal fraudulent joinder, federal immunity, and federal preemption by the Veterans' Benefits Act. Defendant Jerry Fox, a UNC employee, also joined in the notices of removal.

Following the completion of limited discovery, the plaintiffs filed a motion for leave to file a second amended complaint in order to name as additional defendants Mark Glasgow, David Callaghan and Grover Miley, former employees of defendant Grumman Technical Services, Inc. The defendant J. R. Bollock has since been voluntarily dismissed without prejudice. A motion for voluntary dismissal of M Donnell Douglas is pending.

There are also pending before the Court a motion to dismiss or for summary judgment filed by defendants Jerry Fox, Benny Revels, and UNC Aviation; and a motion for summary judgment filed by defendants Jerome A. Kuechmann, Thomas W. Harden and Edwin E. Gennette. By order entered October 17, 1994, the Court denied the plaintiffs' motion to strike the defendants' motions, but granted the motion to stay consideration of the motions pending the Court's ruling on the motion to remand, for the reason that a motion for summary judgment is properly considered a response to a motion to remand, although disposition of the motion is not proper until the motion to remand has been decided.

Factual Background

On August 26, 1992, Captain Ishee was riding in the trainer seat of a TA-4J Skyhawk aircraft being flown by Lieutenant Vernon Hill. During the flight, the two men noticed that a large thunder cell had developed, and they decided to end their mission. They approached the Meridian Naval Air Station (NAS) runway and attempted to land the aircraft, but as the plane landed it began sliding out of control. At that time, Lieutenant Hill decided to eject both Captain Ishee and himself to avoid being crushed to death if the aircraft rolled. Lieutenant Hill's ejection sequence performed as expected, and he safely landed. However, Captain Ishee's did not. His parachute never opened, and he fell to his death, leaving as survivors his wife and daughter.

Defendant McDonnell Douglas designed and manufactured both the airplane and its ejection system. Defendants UNC and Grumman were charged with the responsibility of performing maintenance and inspections of the aircraft. UNC was responsible for Intermediate (I-Level) Maintenance, and Grumman was responsible for Organizational (O-Level) Maintenance.

Defendant Grumman had the responsibility of ensuring that the aircraft was ready for issue (RFI). Without Grumman's stamp of approval designating a particular aircraft RFI, the plane would not be released for flight, except in a rare emergency situation which was not present here. Defendants Kuechmann and Harden were Grumman's Site Manager and O-Level Maintenance Manager, respectively. Under its O-Level Maintenance contract with the government, Grumman was required to perform inspections on the airplane's parachutes. Grumman employees had performed parachute inspections on the aircraft immediately prior to Captain Ishee's fatality. Defendant Harden acknowledged that a "Mr. Callaghan" removed Captain Ishee's parachute and that a "Mr. Glasgow" reinstalled it. Both of these individuals are named as defendants in the plaintiff's proposed second amended complaint. There were also other inspections of the parachute by Grumman employees prior to the date of the accident.

Defendant UNC was charged with the responsibility of performing O-Level Maintenance on the aircraft's component parts. UNC was directly responsible for packing and unpacking the parachutes that are contained in the TA-4J Skyhawks at Meridian NAS. UNC had six parachute riggers at Meridian who were responsible for packing parachutes. Under the UNC hierarchy, parachute riggers were under defendants Revels' and Fox's direct supervision and control. Defendants Fox and Revels were UNC's Site Manager and Production Manager/Assistant Site Manager respectively.

The Fraudulent Joinder Issue

Title 28 U.S.C. § 1332 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States . . .

. . .

(c) For the purpose of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . .

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . .

However, Title 28 U.S.C. § 1441(b) provides that suit between citizens of different States are not removable from state court to federal court if any of the parties in interest properly joined and served is a citizen of the State in which such action is brought. In the instant case, the defendants charge that the individual defendants who are citizens of the State of Mississippi have been fraudulently joined by the plaintiffs for the purpose of defeating removal jurisdiction.

The parties discuss at length the question of whether Captain Ishee was a citizen of Mississippi or of Alabama at the time of his death. Because of section 1441(b), however, the question is not dispositive of the fraudulent joinder issue. All corporate defendants are foreign corporations. All individual defendants are citizens of the State of Mississippi. Since the action was brought in the State of Mississippi, removal jurisdiction is not proper if any of the individual resident defendants were properly joined and served.

Generally, the joinder of parties by the plaintiffs will be allowed to defeat removal jurisdiction, even if such joinder is collusive or improper. But if joinder is fraudulently intended by the plaintiffs to defeat removal jurisdiction, it will not be allowed. The burden is on the defendants to prove fraudulent joinder by clear and convincing

evidence. A party is deemed to have been joined "fraudulently" if, after all disputed questions of fact and all ambiguities in the controlling state law are resolved in the plaintiffs' favor, the plaintiffs could not possibly recover against the party whose joinder is questioned. *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 101 (5th Cir.), *cert. denied*, 498 U.S. 817, 111 S.Ct. 60, 112 L.Ed.2d 35 (1990).

Federal law requires the defendants to make a clear and convincing showing, with particularity as to specific facts, that the allegations in the complaint would provide no basis for recovery against the individual defendants under Mississippi law. Furthermore, the Court must resolve questions of fact, as well as uncertainties regarding Mississippi law, in favor of the plaintiffs.

If there is even a possibility that the state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiffs, then this Court must find that the in-state defendant has been properly joined, that there is incomplete diversity, and that the case must be remanded to state court. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981).

Issues of liability ordinarily may not be determined on a motion to remand a case removed on the ground of diversity of citizenship; however, upon allegations of fraudulent joinder to prevent removal, federal courts may look beyond the pleadings to determine if the joinder, even though fair on its face, is a sham or fraudulent device to prevent removal. In this case, in order for the Court to disregard joinder of the non-diverse defendants and retain jurisdiction on grounds of diversity, it must be clear that no cause of action can lie against any of the individual resident defendants. Joinder of a resident defendant is fraudulent only if "the plaintiff fails to state a cause of action against a resident defendant, and the

failure is obvious according to the settled rules of the state." *Moore's Federal Practice* (1986) PO.1619[2].

Thus the issue here is whether the complaint sets forth a viable cause of action against any of the individual resident defendants. Given the liberal standard regarding the determination of the existence of a viable cause of action, as outlined above, this Court is compelled to resolve all doubt in favor of the plaintiff. However, while it is true that this Court is not to decide whether the plaintiffs will actually or probably prevail on the merits, but is to look only for a possibility that they may do so (*see Green v. Amerada Hess Corp.*, 707 F.2d 201 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039, 104 S.Ct. 701, 79 L.Ed.2d 166 (1984)), the Fifth Circuit Court of Appeals has ruled that in looking for such a possibility, a district court is to consider a removing party's claim of fraudulent joinder as similar to a motion for summary judgment. *Carriere*, 893 F.2d at 100). Thus, while this Court is not obligated to decide the defendants' motions for summary judgment before addressing the motion to remand, it *is* obligated to treat the defendants' claim of fraudulent joinder in the same manner as a motion for summary judgment. This means that the Court must pierce the pleadings to determine whether, under controlling state law, the plaintiffs have a valid claim against the non-diverse parties. *Id.* The Court is required to identify fraudulent or baseless claims in the plaintiffs' complaint. *LeJeune v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992).

The defendants object to the joinder of the individual defendants in the plaintiffs' original complaint, for the reason that these defendants' positions in their respective companies were managerial only, and according to the defendants, they did not actively participate in the inspection, maintenance or repair of the aircraft. The plaintiffs, on the other hand, assert that they are suing the defend-

ants for their direct, personal negligence, and that each defendant actively participated in the commission of a tort. Rather than focus on the original defendants, however, the Court will first decide whether to allow the plaintiffs to file their second amended complaint, which names as additional defendants Mark Glasgow, David Callaghan and Grover Miley, former employees of Grumman, all of whom are also resident citizens of Mississippi. Defendant Grumman acknowledges that these individuals "did have some contact with some components of the airplane;" it contends, however, that they acted in the course and scope of their employment with Grumman, and therefore cannot be held individually liable.

Title 28 U.S.C. § 1447(e) provides that "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." "[A] district court, when confronted with an amendment to add a nondiverse nonindispensable party, should use its discretion in deciding whether to allow that party to be added . . . . If the court grants the joinder, it must . . . remand the case to state court. If it denies the joinder, it cannot remand." *Hensgens v. Deere & Co.*, 883 F.2d 1179, 1182 (5th Cir. 1987). "The district court, when faced with an amended pleading naming a new nondiverse defendant in a removed case, should scrutinize that amendment more closely than an ordinary amendment." *Id.* In determining whether to grant leave to amend, "the court should consider the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities." *Id.*

This Court must balance the equities and determine whether the motion to amend the complaint to add three

new nondiverse parties should be granted. The Court finds first of all that the original complaint filed in state court alleged a cause of action against a sub-group of "John Does" 1-50, designated "John Does" 1-10, "the individuals and/or entities who were partly or wholly responsible for the maintenance, repair, testing, and/or inspection of the pilot ejection system, including all components, of the subject A-4 aircraft who in fact maintained, repaired, tested, and/or inspected same." Now that the identity of three of the John Doe defendants has been ascertained, the plaintiffs maintain that they are entitled to have them joined as defendants.

Applying the guidelines of *Hensgens,* the Court also finds that the original complaint and the proposed second amended complaint allege intentional tortious conduct on the part of the individual defendants in connection with their inspection, maintenance and/or repair of the ejection system and its component parts, including the parachute, and allege that they "engaged in conduct or omissions that were . . . grossly negligent, wanton, willful, and/or in reckless or conscious disregard of Plaintiffs' rights . . . ." The plaintiffs assert that these defendants actively participated in the commission of a tort.

In *Sullivan v. Leaf River Forest Products, Inc.,* 791 F.Supp. 627 (S.D. Miss. 1991), this Court found ample authority for the proposition that in Mississippi

> . . . a tort claim can be maintained against an agent of a corporation if that individual actively participates in the commisison of a tort. *Mississippi Printing v. Maris, West & Baker,* 492 So.2d 977 (Miss. 1986); *Wilson v. South Cent. Miss. Farmers, Inc.,* 494 So.2d 358 (Miss. 1986). An individual employee named in a tort suit may be held personally liable even though that employee is not a designated agent of the corporation. *Wilson,* 494 So.2d at 361. The individual must have some direct personal par-

> ticipation in the tort in order to be held personally liable. *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 173 (5th Cir. 1985).

Sullivan, 791 F.Supp. at 631.

Focusing on defendants Glasgow, Callaghan and Miley, the Court finds that what they actually did or did not do, whether they acted outside the scope of their employment, and whether they are individually liable, are factual issues in whole or in part. Without reaching the issue of fraudulent joinder as to the other individual defendants, the Court finds that at least as to these three defendants, a possibility that the plaintiffs might recover from them exists, and they have not been fraudulently joined.

The Court now considers the effect of Glasgow, Callaghan and Miley being named originally as John Doe defendants. In *Bryant v. Ford Motor Co.*, 794 F.2d 450 (9th Cir. 1986), the Ninth Circuit considered Doe defendants in determining whether there was complete diversity of citizenship in order to determine if removal to the federal court was proper. Similarly, this Court can consider whether the Doe defendants were citizens of Mississippi in determining if removal was proper under § 1441(b). As discussed above, the identity and citizenship of these three Doe defendants having been established, and the defendants' claims of fraudulent joinder having been rejected, the Court has properly considered the citizenship of these three defendants.

Nor does the fact that Glasgow, Callaghan and Miley have not been served with process prevent this Court from treating them as defendants in determining whether to remand this action to state court. Although § 1441(b) speaks of parties "properly joined and served," the courts have held that service is not the key factor. The defendants cannot remove "if the citizenship of any codefendant, joined by the plaintiff in good faith, destroys complete

diversity, regardless of service or non-service upon the codefendant." *Preaseau v. Prudential Ins. Co. of America,* 591 F.2d 74, 78 (9th Cir. 1979); *see also Apelian v. U.S. Shoe Corp.*, 664 F.Supp. 1370 (C.D. Cal. 1987); *Schwegmann Bros v. Pharmacy Reports, Inc.*, 486 F.Supp. 606 (E.D. La. 1980); *Zoila-Ortego v. BJ-Titan Services Co.*, 751 F.Supp. 633, 637 (E.D. La. 1990); *Aydell v. Sterns,* 677 F.Supp. 877, 879 (M.D. La 1988).

In the case *sub judice,* the court finds that the purpose of the plaintiffs' proposed second amendment is not to defeat federal jurisdiction. The original complaint stated a cause of action against these individuals, named as "John Doe" defendants, and the plaintiffs have moved to amend upon being advised of their identities. The arguments that these individuals are not wealthy, and are therefore incapable of sustaining a large verdict, and that adding them will complicate the litigation, are not persuasive as long as their joinder is not fraudulent. The Court finds that the defendants have failed to prove fraudulent joinder, and the amendments should be allowed. The issue of whether these defendants are entitled to fedral immunity from suit is discussed below in the part of this opinion dealing with the Federal Officer Removal Statute.

Federal Question

There are three types of jurisdiction alleged in the defendants' notices of removal: (1) diversity, (2) federal question, and (3) federal officer removal. Before proceeding further, it is necessary to consider the procedural background concerning the removal notices. Title 28 U.S.C. § 1446(b) provides that notices of removal must be filed within 30 days of receipt by the defendant of the complaint. In the event that the case is not removable as to a particular defendant until an amended complaint is filed, the notice of removal must be filed within 30 days of receipt of the amended complaint.

The defendant McDonnell Douglas filed a notice of removal from the Circuit Court of Hinds County to this Court on July 30, 1993. On August 2, 1993, the plaintiffs filed their first amended complaint. On August 3, 1993, the defendant UNC was served. On August 9, 1993, Gruman joined in the removal notice. On August 10, 1993, the defendants Jerry Fox and Benny Revels were served. On August 19, 1993, the plaintiffs filed their motion to remand. On August 23, 1993, UNC joined in the removal notice. On September 3, 1993, defendant Jerry Fox joined in the removal notice. Magistrate Judy Nichols has already determined that the actions of McDonnell Douglas and Gruman were sufficient to perfect removal under 28 U.S.C. § 1446 (Order on Plaintiffs' Motion to Remand, September 1, 1993). Likewise, UNC's and Jerry Fox's notices of removal were timely, because they were filed within 30 days of the time these defendants received the complaint. All issues raised in the removal notices are therefore properly before the Court.

(a) Veterans' Benefits Act

The defendants allege federal question jurisdiction based on the Veterans' Benefits Act, 38 U.S.C. § 101, *et seq.* The plaintiffs contend that their claims are governed solely by state law.

In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Supreme Court held that the United States cannot be held liable under the Federal Tort Claims Act for injuries to a serviceman if the injuries "arise out of or are in the course of activity incident to service." *Id.* at 146, 71 S.Ct. at 159. Although the Act incorporates state-created causes of action by reference, the Court found such incorpration inappropriate in the military context. In *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d

665 (1977), the Court explained the considerations that underlay its decision in *Feres*:

> First, the relationship between the Government and members of its Armed Forces is " 'distinctively federal in character' " . . .; it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government.

Id. at 671, 97 S.Ct. at 2057 (citations omitted). The *Stencel Aero* Court added that the Government's immunity from suit for injuries sustained in conjunction with military service was further justified by " '[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.' " *Id.* at 671-72, 97 S.Ct. at 2057-58 (quoting *United States v. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 145, 99 L.Ed. 139 (1954)).

The underpinnings of *Feres* and *Stencel Aero* do not justify the application of federal law in this case. The defendants here are government contractors or service providers, not military personnel, the Government, or a branch of the Armed Services. *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969), explicitly holds that state law governs such suits. *Also see Day & Zimmerman v. Challoner*, 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3 (1975) (per curiam).

Government contractors and service providers regularly face the possibility that they will be subjected to different standards of liability in different jurisdictions.

Suits by servicemen against such defendants present no danger of circumventing the limitations on governmental liability contained in the Veterans' Benefits Act. And because such suits generally do not necessitate the second-guessing of military decisions envisioned in *Feres* and *Stencel Aero*, they do not pose the same threat to military discipline as do suits against the Government. In addition, the Court finds that the application of state law would not pose a threat to an identifiable federal policy.

The question remains whether the defendants are entitled to raise a federal defense to the plaintiffs' state law claims, a matter discussed below in connection with the Federal Officer Removal Statute.

(b) Federal Enclave Jurisdiction

A second grounds the defendants assert for federal question jurisdiction is that the Meridian NAS is a federal enclave. In *Mater v. Holley*, 200 F.2d 123 (5th Cir. 1952), the Fifth Circuit noted that as a Constitutional matter, Congress has exclusive legislative power over "all Places purchased by the consent of the legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. Const. art. I, § 8, cl. 17.

The Fifth Circuit held that the district court had federal question jurisdiction in *Mater*, reasoning that any law existing in territory over which the United States has exclusive sovereignty is federal law, since it must derive its authority and force from the United States, and "it would be incongruous to hold that although the United States has exclusive sovereignty in the area here involved, its courts are without power to adjudicate controversies arising there . . . ." *Mater*, 200 F.2d at 124.

Federal enclave jurisdiction provides a means of preventing state legislative interference with public lands. However, it is confined to those cases in which the United

States has *exclusive* sovereignty. If a state retains concurrent jurisdiction when it grants property to the federal government, the state also retains jurisdiction, and events occurring on base can give rise to claims in state court.

The Meridian NAS is such an installation, where the federal government has not acquired exclusive jurisdiction over the land on which the base is located, and the federal and state governments have concurrent jurisdiction. *See United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973). Thus, federal enclave jurisdiction is not available in this case.

Federal Officer Removal Statute

This Court has determined that it has no diversity jurisdiction or federal question jurisdiction of this action; therefore, the Court has jurisdiction only if one or more of the removing defendants is entitled to remove by virtue of the Federal Officer Removal Statute. Title 28 U.S.C. § 1442(a)(1) provides, in pertinent part, that any person acting under an officer or agency of the United States, for acts under color of such office, may remove an action from state court to federal district court.

Before examining the requirements of the statute and their applicability to this case, however, it is necessary to address another procedural issue. On November 26, 1993, the plaintiffs and McDonnell Douglas filed a joint motion to dismiss McDonnell Douglas from this suit without prejudice, to which Grumman filed a response in opposition.

Gruman opposes dismissal of McDonnell Douglas, and asks the Court to first determine that it has jurisdiction over this action before dismissing McDonnell Douglas. The Court excused McDonnell Douglas from filing a response to the plaintiffs' motion to remand, and held the motion to dismiss in abeyance until the propriety of the plaintiffs' motion to remand could be decided.

The first question this Court must address is whether McDonnell Douglas' right to remove this case under the Federal Officer Removal Statute should be considered, even though the plaintiffs have moved to voluntarily dismiss McDonnell Douglas.

The Court notes first of all that subject matter jurisdiction is determined by looking to the complaint as it existed at the time of removal. However, some subsequent developments in a case may divest a federal court of jurisdiction, while others may not. *IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 157 (5th Cir. 1982). Title 28 U.S.C. § 1447(c) provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The Fifth Circuit does not interpret this provision to mean that every change that appears to affect jurisdiction in fact does; rather, it adheres to the view that some post-removal developments will impact jurisdiction, and others will not. *Id.* at 158. "The specific change must be analyzed under general jurisdictional principles to determine whether it divests a court of its power to hear the case." *Id.*

In *IMFC Professional*, the plaintiff sued Latin American, a home health care provider, based on a contract whereby IMFC would purchase receivables of Latin American at a discount. The receivables consisted of Medicare reimbursements due Latin American by the Department of Health and Human Services (HHS) through its fiscal intermediary Aetna Life and Casualty Insurance Company. IMFC sued Latin American and Aetna in state court. HHS intervened a defendant and removed the case to federal district court. After IMFC voluntarily dismissed Aetna and HHS, the case was remanded to state court, where Latin American filed a third-party complaint against Aetna. HHS again intervened, as the real party in interest in the stead of Aetna, and removed the case back to fed-

eral court. HHS then moved to dismiss the third-party complaint against it based on Latin American's failure to exhaust administrative remedies. The motion to dismiss was granted, and the court also granted summary judgment in favor of IMFC against Latin American. Latin American appealed, claiming that once HHS was dismissed, the only matter remaining before the district court was a state law claim between nondiverse parties, thus the court lacked subject matter jurisdiction and should have remanded the case to state court before deciding the motion for summary judgment.

Like the defendants in the case *sub judice,* HHS based its notice of removal on the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1). The Fifth Circuit found that § 1442 does not require that the federal court have subject matter jurisdiction over the claim against the federal officer; rather, the only requirement is that the suit be brought against a federal officer. *Id.* at 156. The statute "grants independent jurisdictional grounds over cases involving federal officers where a district court otherwise would not have jurisdiction." *Id.,* citing *S.S. Silberblatt, Inc. v. East Harlem Pilot Block,* 608 F.2d 28, 35 (2nd Cir. 1979).

The Fifth Circuit, in *IMFC Professional,* found that removal was proper, and that the district court initially had jurisdiction under the Federal Officer Removal Statute. The Court concluded that dismissal of HHS did not deprive the district court of power to entertain the remaining state law controversy, noting that § 1442(a)(1) "creates a species of ancillary jurisdiction over the nonfederal elements of the case." *Id.* at 158. Except where there is no personal jurisdiction over the federal officer, elimination of the officer from a removed case does not oust the district court of jurisdiction. *Id.* at 159.

However, the Court's inquiry did not end there. It then considered whether the district court had discretion

to remand the case to state court. Following *Thermtron Products, Inc. v. Hermandsdorfer,* 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), the Court found that although a district judge does not have unbridled discretion in this area, there are instances when the exercise of discretion is appropriate in the remand process. Neither § 1447(c), nor *Thermtron* prohibit the use of discretion, if it is based on clearly articulated authority. *Id.* at 159-60.

As examples of clearly articulated authority, the Fifth Circuit cited the separate claim removal provision of § 1441(c), the doctrine of "pendent" jurisdiction, and the abstention doctrine. Because none of these were involved in *IMFC Professional,* the Court looked to the Federal Officer Removal Statute itself, and found that it created "ancillary" jurisdiction over state law claims. Under ancillary jurisdiction, once the federal controversy has been eliminated, the decision to entertain the remaining state law controversy is discretionary. *Id.* at 160.

Because the Fifth Circuit reversed the lower court on the grounds that summary judgment against IMFC was incorrect, it found that on remand to the district court, that court could assess the propriety of retaining jurisdiction of the case. If it chose to decline jurisdiction, it could remand the case under § 1447(c) as one "removed improvidently and without jurisdiction." *Id.; accord Spencer v. New Orleans Levee Board,* 737 F.2d 435 (5th Cir. 1984).

Unlike *IMFC Professional,* the case *sub judice* involves pendent, not ancillary, jurisdiction; however, the distinction was rendered moot by the passage in 1990 of 28 U.S.C. § 1367, which codified both doctrines under the name "supplemental jurisdiction." The statute is applicable to this action since it was commenced after December 1, 1990. The question then is if this Court has supple-

mental jurisdiction over this case solely because McDonnell Douglas has the right to remove under the Federal Officer Removal Statute, does the Court have discretion to remand the remainder of the case if McDonnell Douglas is dismissed? Further, if it does, should that discretion be exercised?

The supplemental jurisdiction statute provides, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder or intervention of additional parties.
>
> . . .
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367.

The Commentary which follows the statute in the United States Code Annotated illuminates the judicial history and legislative intent which led to its passage. The Supreme Court in *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), recognized the doctrine of pendent jurisdiction, wherein the federal court is *permitted* to entertain both federal claims and state claims of the plaintiff in the federal forum. *Practice Commentary,* 28 U.S.C. § 1367, p. 829 (West 1994).

"Pendent party" jurisdiction, which addressed the situation where a plaintiff asserted federal claims against one party and purely state claims against a different party, was rejected in *Aldinger v. Howard,* 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 275 (1976), and again rejected in *Finley v. United States,* 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989), even where the federal claim was within the exclusive jurisdiction of the federal courts, such that there was no single forum where the plaintiff could bring both claims. Both *Aldinger* and *Finley* were legislatively overruled by the last sentence of subdivision (a) of § 1367, which states that "supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367 Practice Commentary, pp. 831-32.

Section 1367 (c)(3) grants the district court the discretion to decline supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction. It is apparent that, while allowing federal courts to take supplemental jurisdiction over state law claims, Congress intended for federal courts to have the discretion to decline such jurisdiction when circumstances so warrant. The Commentary states:

> Whether a dismissal of the touchstone claim should bring about a dismissal (or remand, in a removal situation) of the dependent claim for want of sup-

> plemental jurisdiction should hinge on the moment within the litigation when the dismissal of the touchstone claim takes place, and the other surrounding circumstances. If, for example, the main claim is dismissed early in the action, before any substantial preparation has gone into the dependent claims, dismissing or remanding that latter upon declining supplemental jurisdiction seems fair enough. But if the dismissal of the main claim occurs late in the action, after there has indeed been substantial expenditure in time, effort, and money in preparing the dependent claims, knocking them down with a belated rejection of supplemental jurisdiction may not be fair. Nor is it by any means necessary. The discretion implicit in the word "may" in subdivision (c) of § 1367 permits the district court to weigh and balance all of these factors. The House Report of the Committee on the Judiciary (Report 101-734, p. 29) said of subdivision (c) that it requires the district court, in exercising discretion, to undertake, as it did under prior law, a "case-specific analysis." So for clause (3).
>
> Finally, clause (4). The Report also said that clause (4) was being included just to be sure that the court can decline supplemental jurisdiction in other "exceptional circumstances" that present "compelling reasons." While appearing to constitute a separate category for declining supplemental jurisdiction, distinct from the first three, the language of clause (4) would also appear to indicate that all declinations of supplemental jurisdiction should be reserved for situations in which there are "compelling reasons."

28 U.S.C. § 1367 Practice Commentary, pp. 835-36.

It is therefore proper to consider McDonnell Douglas' right to remove this case under the Federal Officer Re-

moval Statute. In the event that none of the defendants are entitled to remove under § 1442(a)(1), then of course the entire action could be remanded for lack of jurisdiction. In the event that any of the removing defendants, including McDonnell Douglas, are entitled to remove under § 1442(a)(1), this Court would have jurisdiction over the entire action; however, if only McDonnell Douglas is entitled to remove, and if McDonnell Douglas is then dismissed from the case, the Court would next decide whether to exercise its discretion to remand the case to state court.

> Subdivision (c) of § 1367 sets forth the grounds upon which the court
>
> > may decline to exercise supplemental jurisdiction over a claim under subsection (a) . . .
>
> The operative verb is "may", importing its usual broad degree of discretion, so that there may be a temptation to conclude that what Congress has given with one hand—under subdivision (a) the court "shall have" supplemental jurisdiction—it has taken away with the other, or permitted the judges to take away with the "may decline" language of subdivision (c). But the decline must be based on one of the four numbered grounds set forth in subdivision (c).

28 U.S.C. § 1367 Practice Commentary, p. 834.

Particularly with regard to clause (3) of subdivision (c) (dismissal of all claims over which the district court has original jurisdiction), district courts "enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state claim." *Noble v. White,* 996 F.2d 797 (5th Cir. 1993).

> The idea here is that once the crutch is removed—the claim that supports the supplemental jurisdiction of the other claim or claims—the other should not remain for adjudication. Here there is a substantial

> caselaw, handed down in a variety of situations, suggesting in the aggregate that in this category judicial discretion is particularly important element. Here the "may" is "may decline" has a major role to play.

28 U.S.C. § 1367 Practice Commentary, p. 835.

Rather than first determining if McDonnell Douglas is entitled to remove under the Federal Officer Removal Statute, the Court will simply assume that McDonnell Douglas is entitled to remove. To require McDonnell Douglas to brief the issue, when it no longer has any interest in doing so, would be unnecessary if the Court decides to grant the motion for voluntary dismissal. The Court will therefore first address the motion for voluntary dismissal.

Rule 41 of the Federal Rules of Civil Procedure permits a plaintiff to voluntarily dismiss a claim after an answer or motion for summary judgment has been served, either by stipulation of all the parties who have appeared in the action, or by order of the court "upon such terms and conditions as the court deems proper." Fed. R.Civ.P. 41(a)(1), (2). Here, the defendant Grumman objects to the dismissal for jurisdictional reasons. The plaintiffs advise the Court that during discovery on the jurisdictional issues, the plaintiffs learned that McDonnell Douglas had no contact with Captain Ishee's TA-4J aircraft after its manufacture. Having made the determination that McDonnell Douglas was not responsible for Captain Ishee's death, they moved for voluntary dismissal. The Court finds no evidence that the motion to dismiss was filed for purposes of jurisdictional maneuvering. Further, by assuming that it has jurisdiction over McDonnell Douglas, the Court has adequately addressed the concerns voiced by Grumman in its objection to the motion for voluntary dismissal. The motion for voluntary dismissal is therefore well-taken and shall be granted.

The Court now turns to the question of whether any of the remaining removing defendants, Grumman, UNC or Jerry Fox, is entitled to remove this action under the Federal Officer Removal Statute. Title 28 U.S.C. § 1442 provides, in pertinent part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office. . . .

The Supreme Court, in *Mesa v. California,* 489 U.S. 121, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989), expounded on the requirements of the statute. The removing party must

> (1) be a federal officer or demonstrate that it acted under the direction of a federal officer;
>
> (2) raise a federal defense to the plaintiffs' claims; and
>
> (3) demonstrate a causal nexus between the plaintiffs' claims and the acts it performed under color of federal office.

Id. 489 U.S. at 124-25, 129-31, 134-35, 109 S.Ct. at 962-63, 965, 967-68.

Since Grumman, UNC and Jerry Fox are not federal officers, they must qualify as "persons" within the meaning of the statute. The plaintiffs assert that Grumman and UNC, because they are corporations, cannot be "persons" within this context. The plaintiffs cite *International Primate Protection League v. Administrators of Tulane Educational Fund,* 500 U.S. 72, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991), which holds that state court suits naming only a federal agency (rather than a particular offi-

cial) as defendant were not removable under § 1442(a)(1) because a federal agency is neither an "officer of the United States" nor a "person acting under him."

Although *International Primate* did not decide whether corporations can be considered persons for purposes of the removal statute, a number of district courts have held that they cannot. *E.g., Krangel v. General Dynamics,* 791 F.Supp. 1436 (S.D. Cal. 1992); *Roche v. American Red Cross,* 680 F.Supp. 449 (D. Mass. 1988); *Gensplit Finance Corp. v. Foreign Credit Ins. Ass'n.,* 616 F.Supp. 1504 (E.D. Wis. 1985); *Lowe v. Norfolk & W. Ry. Co.,* 529 F.Supp. 491 (S.D. Ill. 1982). However, a number of courts have come to the opposite conclusion. *E.g., Crocker v. Borden, Inc.,* 852 F.Supp. 1322 (E.D. La. 1994); *Aiken v. Big Three Industries, Inc.,* 851 F.Supp. 819 (E.D. Tex. 1994); *Pack v. AC and S, Inc.,* 838 F.Supp. 1099 (D. Md. 1993); *Bahrs v. Hughes Aircraft Co.,* 795 F.Supp. 965 (D. Ariz. 1992); *Bakalis v. Crossland Savings Bank,* 781 F.Supp. 140 (E.D. N.Y. 1991); *Ryan v. Dow Chemical Co.,* 781 F.Supp. 934 (E.D. N.Y. 1992).

Title 1 U.S.C. § 1 provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations." *See also Perrin v. United States,* 444 U.S. 37, 45, 48-49, 100 S.Ct. 311, 315, 317, 62 L.Ed.2d 199 (1979) (statute will ordinarily be viewed as using the common meaning of a word).

While there is some discussion in *International Primate* of the intention of Congress to protect "individual officials" as opposed to *agencies,* this Court finds the best-reasoned opinions on the subject of *corporations* to be those that take a broad approach to the definition of "person." The reasoning of the *Ryan* court is persuasive, in that Judge Weinstein chose to define "person" in a manner that is congrous with "the purpose of the section read

as a whole." *Ryan*, 781 Supp. at 946. The court found that a "purely legal person such as a corporation could be engaged in activities that amount to the implementation of a federal policy under the direction of a government officer" so that a state court suit against such a corporation could inhibit federal policy. *Id.* Grumman and UNC qualify as "persons" under the statute. The Court therefore will apply each of the three considerations outlined in *Mesa* to Grumman, UNC and Fox:

(a) "Acting under the direction of a federal officer"

The removing defendants must demonstrate that they were acting under the direction of an officer of the United States. There is no dispute that, in a general sense, the defendants' activities on the base were under the direction of the federal government. UNC and Grumman had maintenance contracts with the Navy whereby they were to provide I-Level and O-Level maintenance, respectively, to the aircraft. The Navy provided technical manuals and maintenance requirement cards, and provided other forms of general direction of the defendants' work.

The plaintiffs contend that the defendants have not shown that they were "acting under" an officer of the United States because they have failed to establish that an officer had direct and detailed control over their activities. " 'Direct control' is established by showing strong government intervention and the possibility that a defendant will be sued in state court as a result of the federal control. *Fung* [*v. Abex Corp.*], 816 F.Supp. [569] at 572 [(N.D. Cal. 1992)]; *see Gulati v. Zuckerman*, 723 F.Supp. 353, 358 (E.D. Pa. 1989)." *Pack v. AC and S. Inc.*, 838 F.Supp. 1099, 1103 (D. Md. 1993).

There is some question about the applicability of cases dealing with manufacturers of military equipment to the defendants now under consideration in this case, who are maintenance service providers. The Court simply notes

that there is at least some governmental control, and will focus its attention instead on the other two *Mesa* considerations, which have traditionally received more extensive analysis from the courts.

(b) Federal defense

The second question is whether the defendants raise a federal defense to the plaintiffs' claims. In *Whillingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969), the Supreme Court held that a removing parties need only raise "a colorable defense arising out of their duty to enforce federal law." *Id.*, 395 U.S. at 406-07, 89 S.Ct. at 1816.

The *Mesa* Court signalled a narrowing of section 1442(a)(1). With one possible narrow exception (*see Mesa*, 109 S.Ct. at 966), a removing party must now allege a federal law defense. *Id.* at 966-67. Nevertheless, the question is still only whether a "colorable claim" to a federal defense has been made. The defendants need not prove that they can sustain the defense.

The defendants aver a colorable claim to a defense under *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), and to the government contractor defense enunciated in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). Prior to *Boyle*, in *Yearsley*, the Supreme Court held that a public works project contractor of the United States following the government's instructions shares the sovereign immunity that protects the United States from suit. In *Yearsley*, neighboring riparian landowners filed an action against a construction company for damages they incurred as a direct result of the defendant's erection of dikes that the United States contracted to build pursuant to an Act of Congress. It was undisputed that the contractor built the dikes precisely in accordance with the government's instructions.

The Fifth Circuit, discussing *Yearsley* in *Bynum v. FMC Corp.*, 770 F.2d 556, 563-64 (5th Cir. 1985), noted: "Of course, contractors that fail to follow government specifications or otherwise mismanufacture a product are not entitled to raise the defense." The Court further observed:

> The problem with applying the *Yearsley* defense in the context of the military contractor is the apparent requirement that the contractor posses an actual agency relationship with the government. While federal courts certainly have not always required such a relationship [citations omitted], it is the law at least in this Circuit that the contractor must be an agent of the government before invoking its immunity. Thus, in *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969), we rejected a claim of immunity . . . on the ground that the defendants—although having close contractual ties with the government—ultimately were independent contractors. The difficulty of establishing a traditional agency relationship with the government makes the derivative sovereign immunity defense ill-suited to many manufacturers of military equipment.

Bynum, 770 F.2d at 564. Therefore, under *Bynum*, the *Yearsley* defense is not available if the defendants are independent contractors, or if the plaintiffs allege that the defendants failed to follow government specifications.

Boyle v. United Technologies Corp., 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), enunciated the government contractor defense for manufacturers of military equipment. The Supreme Court held that "[l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier

but not to the United States." *Id.*, 487 U.S. at 512, 108 S.Ct. at 2518.

The first question is whether the defendants have established a colorable claim to the military contractor defense. The plaintiffs contend that *Boyle* applies only to *manufacturers* of military equipment, and more specifically to design defect cases. The defendants assert that *Boyle* can be extended by implication to *service providers.*

In *Ryan,* Judge Weinstein noted:

> There is considerable question as to whether the military contractor defense amounts to a defense of official immunity, or even to a defense at all. Generally, the Supreme Court has been reluctant to expand the federal common law of official immunity in the absence of specific congressional legislation. *See Boyle,* 108 S.Ct. at 2523-24 (Brennan, J., dissenting). This is because "official immunity comes at a great cost," and thus "absolute immunity for federal officials is justified only when 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.' " *Westfall v. Erwin,* 484 U.S. 292, 108 S.Ct. 580, 583, 98 L.Ed.2d 619 (1988) (quoting *Doe v. McMillan,* 412 U.S. 306, 320, 93 S.Ct. 2018, 2028, 36 L.Ed.2d 912 (1973)).

Ryan, 781 F.Supp. at 944.

Judge Weinstein further observed that the *Boyle* Court was careful to point out that its preemption analysis did not extend official immunity to government contractors.

> In fact, the majority took pains not to disagree with the dissent's claim that official immunity has never been understood to extend to contractors acting independently of any congressional enactment. *See* [*Boyle,* 108 S.Ct. at 2514 n. 1; and *Boyle*] at 2524 (Brennan, J., dissenting). Most relevant to the issue of § 1442(a)(1) removal, the *Boyle* dissent noted

> that "a grant of immunity to Government contractors could not advance 'the fearless, vigorous, and effective administration of policies of government' nearly as much as does . . . immunity for Government employees." *Id.* at 2524 (Brennan, J. dissenting) (quoting *Barr v. Matteo,* 360 U.S. 564, 576, 79 S.Ct. 1335, 1342, 3 L.Ed.2d 1434 (1959) (plurality opinion)). It is, of course, the vigorous pursuit of policy by government officials that section 1442(a)(1) is designed to protect.

Ryan, 781 F.Supp. at 944.

The Court finds that *Boyle* cannot by implication be extended to providers of services to the military. The government contractor defense is a defense that shields government contractors from liability under state law for design defects in products that they have manufactured for the United States. The Court has found no authority to support the defendants' position. Furthermore, there is no comparison between a claim based upon a design defect in a product and a claim based upon intentional misconduct. Thus, the government contractor defense is unavailable to Grumman, UNC and Fox.

However, the government agency defense, which grows out of *Yearsley,* does apply to government performance contracts in certain cases. In *Yearsley,* all work done by the contractor was authorized and supervised by the United States, and was performed pursuant to an Act of Congress. *Yearsley,* 309 U.S. at 20, 60 S.Ct. at 414. The Court held that when a contractor acts as an agent for the United States and has valid congressional authority, then the contractor is not liable for executing that authority. *Id.* at 20-21, 60 S.Ct. at 414 ("[I]t is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."). Moreover, the Court noted that an agent acting on behalf of the

United States is only liable for his conduct when "he exceeded his authority or [the authority] was not validly conferred." *Id.* at 21, 60 S.Ct. at 414.

As noted above, the Fifth Circuit has, in applying the *Yearsley* defense, required that the contractor be an agent of the government before invoking its immunity. Close contractual ties with the government do not establish such a relationship, if the contractor is ultimately found to be an independent contractor. *Yearsley* is also inapplicable where the contractor exceeds its governmental authority or fails to follow government specifications. *Bynum*, 770 F.2d at 563-64.

The Eleventh Circuit has also expounded on the government agency defense, in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *cert. den.*, 487 U.S. 1233, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988), stating that a court should make a three- step inquiry in determining whether the government agency defense is available:

> First, [the court] would . . . determine whether the government itself could be sued in that situation. If not, the court would then invoke a second body of doctrine, the law of principal and agent, to inquire whether the contractor actually acted as an agent of the government. Precedent in the Court makes it clear that, at least in manufacturing defect cases arising in a military setting, a firm must be more than simply an independent contractor to be regarded as the government's agent. . . . Finally, if the contractor proved agency status, the court would inquire whether the agent acted within the course and scope of its duties.

Id. at 740 (citations omitted).

There is no question that the gravamen of the plaintiffs' complaint is that the defendants failed to perform their jobs properly, i.e. that they failed to follow gov-

ernment instructions and acted outside the scope of their duties. Thus, the *Yearsley* defense is not available to them. This result is supported by analogy to the Fifth Circuit's reading of the *Boyle* government contractor defense. In *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242 (5th Cir. 1990), the Court observed that "*Boyle* reinforced the established reasoning that the government contractor defense only applies in cases of defective design, not in cases of defective manufacture." *Mitchell* at 245 (citation omitted).

> Sound principles of fairness support the distinction between design defects and manufacturing defects. It would be inherently unfair to expose a manufacturer to liability for a defective design that the Government not only specified, but knew was defective. "[T]ort liability principles properly seek to impose liability on the wrongdoer whose act or omission caused the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government." *In re Agent Orange Products Liability Litigation*, 506 F.Supp. 762, 793-94 (E.D. N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Diamond Shamrock Chemical Co. v. Ryan*, 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984). The primary purpose behind the formulation of the government contractor defense was to "prevent the contractor from being held liable when the government is actually at fault . . ." *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1478 (5th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 327, 107 L.Ed.2d 317 (1989). However, the protective shield in favor of the contractor collapses when the actions of the government contractor—and not those of the Government—produce the damaging defect. In such a situation, fairness dictates that a government contractor should not be permitted to escape liability by

> asserting the sovereign immunity of the Government. Thus, "federal law provides no defense to the military contractor that mismanufactures military equipment or that is *itself* ultimately responsible for the design defect." *Bynum*, 770 F.2d at 574 (emphasis added). *See McGonigal* [*v. Gearhart Industries, Inc.*], 851 F.2d [774] at 777 [(5th Cir. 1988)].

Mitchell, 913 F.2d at 245-46 (footnotes omitted).

The evidence also supports a finding that defendants Grumman, UNC and Fox were not agents of the government. Grumman and UNC were, in the truest sense of the phrase, independent contractors, and Fox was an employee of an independent contractor, notwithstanding the fact that the Navy retained the right to inspect their maintenance work and to make certain that they had met contract specifications.

The critical element in determining whether an individual or entity is an independent contractor is the degree of authority exercised by government officials over the detailed physical performance of the contractor. *Logue v. United States*, 412 U.S. 521, 527, 93 S.Ct. 2215, 37 L.Ed.2d 121 (1973). The test is "not whether the [contractor] receives federal money and must comply with federal standards and regulations, but whether its day-to-day operations are supervised by the Federal Government." *U.S. v. Orleans*, 425 U.S. 807, 815, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976); *Ducey v. United States*, 713 F.2d 504, 516 (9th Cir. 1983). As already noted in the discussion of the "acting under" requirement above, the defendants must show strong government intervention and the possibility that they will be sued in state court as a result of the intervention.

In *Strangi v. United States*, 211 F.2d 305 (5th Cir. 1954), the Fifth Circuit held that "[t]he distinction between the master-servant and independent contractor re-

lationship lies largely in the degree of control or right of control retained by the employer over the details of the work as it is being performed, but there is no definite and absolute rule." *Id.* at 307. In a footnote, the Court listed the factors recited in A.L.I. Restatement, Agency, Sec. 220(2), and 27 Am.Jur., Independent Contractors, Sec. 5, p. 485. The Court has weighed all of these factors in light of the circumstances, and finds that direct governmental control to the extent required for agency status did not exist in this case.

Although, the Navy retained a degree of control over the defendants, the defendants were expected to exercise their own independent judgment in deciding whether a particular aircraft was ready for flight. Decisions of the type alleged in the plaintiffs' suit were made by the defendants utilizing guidelines established by the Navy, but without direct on-site intervention or review by Navy personnel. None of the defendants were subject to the kind of "direct and detailed control" by a federal official required in this context. *See Ryan*, 781 F.Supp. at 950; *Gulati v. Zuckerman*, 723 F.Supp. 353, 358 (E.D. Pa. 1989); *Bahrs v. Hughes Aircraft Co.*, 795 F.Supp. 965, 969 (D. Ariz. 1992). Further, the fact that the government retained the power to exercise control does not establish that it was indeed exercised. *Bahrs*, 795 F.Supp. at 970.

Since the Court has already found that the defendants do not have a colorable claim to a federal defense on other grounds, a more detailed discussion of this issue is not warranted.

(c) The nexus requirement

Finally, even if the defendants had a colorable claim to a federal defense, their right to removal depends on a casual relationship between the claims against them and the acts they performed under color of federal office. For example, "when a government contractor builds a product

pursuant to Air Force specifications and is later sued because compliance with those specifications allegedly causes personal injuries, the nexus requirement is satisfied." *Akin v. Big Three Industries, Inc.*, 851 F.Supp. 819, 823-24 (E.D. Tex. 1994). In this case, however, the plaintiffs do not claim that Captain Ishee's death resulted from actions the defendants took in compliance with government directions. Instead, they claim that the defendants failed to follow those directions.

Under the scenario postulated by the plaintiffs, ultimate responsibility for the defendants' actions would rest with them alone, not with the government. It is not alleged that any actions of the defendants which were taken pursuant to federal direction caused the death of Captain Ishee. The defendants have not shown the casual connection required by *Mesa*.

In summary, the Court finds that the defendants have not established a colorable claim to a federal defense, and they have not shown a casual connection between the claims against them and actions they took under color of federal authority. For these reasons, Grumman, UNC and Fox are not entitled to removal pursuant to the Federal Officer Removal Statute.

Discretionary Jurisdiction

The Court now must decide whether to exercise its discretion to decline supplemental jurisdiction and remand this case to state court, since it has already determined that McDonnell Douglas should be dismissed. In reaching its decision, the Court bears in mind the considerations of judicial economy, convenience, and fairness to the litigants as advised in *United Mine Workers*, as well as the considerations suggested by the Commentary to § 1367, quoted above.

On the basis of supplemental jurisdiction alone, the Court is not convinced that there is a substantial interest

in a federal court adjudicating the plaintiffs' state law claims. This suit does not amount to a threat to the enforcement of federal policy, nor does it interfere with the actions of federal officials. The fact that a non-party federal official might later remove this action back to this Court in an ancillary discovery matter, for example to seek protection from a state court order compelling discovery, does not make remand less tenable. In such event, the case would simply be remanded back to state court upon disposition of the ancillary matter. *See Dent v. Packerland Packing Company, Inc.*, 144 F.R.D. 675 (D. Neb. 1992).

The balance between federal and state judicial powers requires the federal courts to give "[d]ue regard for the rightful independence of state governments" and to "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Romero v. International Terminal Operating Company*, 358 U.S. 354, 380, 79 S.Ct. 468, 484, 3 L.Ed.2d 368, 386 (1959).

Clearly, this Court has authority to remand a case removed pursuant to 28 U.S.C. § 1442. *See District of Columbia v. Merit Systems Protection Bd.*, 762 F.2d 129, 133 (D.C. Cir. 1985) (noting that the court may remand state law claims after eliminating the federal parties); *Gulati v. Zuckerman*, 723 F.Supp. 353, 358-59 (E.D. Pa. 1989) (same).

Having determined that the plaintiffs' motion to voluntarily dismiss McDonnell Douglas is well-taken and shall be granted, the court now finds it appropriate to decline to exercise continued jurisdiction over the nonfederal elements of this case. Pursuant to 28 U.S.C. 1447(c), the Court determines that this action has been "removed improvidently and without jurisdiction," and it shall be remanded to the Circuit Court of Hinds County, Mississippi, for further proceedings. Accordingly,

IT IS HEREBY ORDERED that the plaintiffs' motion for leave to file a second amended complaint is GRANTED, and the Clerk of Court is directed to receive the second amended complaint for filing;

FURTHER ORDERED that the plaintiffs' motion for voluntary dismissal of McDonnell Douglas Corporation is GRANTED, and said defendant shall be dismissed from this action without prejudice;

FURTHER ORDERED that the plaintiffs' motion to remand is GRANTED, and this action shall be remanded to the Circuit Court of Hinds County, Mississippi, for further proceedings. The Clerk of Court is directed to notify said court of the disposition of this case;

FURTHER ORDERED that all other motions pending before this Court are rendered moot by the order of remand, and nothing contained herein should be taken as a comment on the respective merits of the parties' claims.

FURTHER ORDERED that counsel for the plaintiffs shall prepare a Judgment in this case, granting the relief outlined above, for submission tothe Court within ten (10) days from the date of this memorandum opinion and order.

SO ORDERED, this the 15th day of December, 1994.

/s/ David Bramlette
UNITED STATES DISTRICT JUDGE

APPENDIX E

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1367 provides, in pertinent part, as follows:

> (a) Except as provided in subsection (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. * * *
>
> (b) In any civil action of which the district courts have original judisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of [such rules] * * * when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection
>
> (a) if—
>
> > (1) the claim raises a novel or complex issue of State law,
> >
> > (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> >
> > (3) the district court has dismissed all claims over which it has original jurisdiction, or
> >
> > (4) in exceptional circumstances, there are

other compelling reasons for declining jurisdiction. * * *

* * * *

28 U.S.C. § 1442 provides, in pertinent part, as follows:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *

* * * *

28 U.S.C.§ 1447 provides, in pertinent part, as follows:

(c) * * * If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. * * * The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that the order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

* * * *

(2)

No. 96-65

FILED
OCT 25 1996
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

GRUMMAN TECHNICAL SERVICES, INC. ET AL
PETITIONERS

V.

ESTATE OF LAMAR ISHEE, ET AL
RESPONDENTS

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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11 pp

PARTIES TO THE PROCEEDING

In addition to Respondents, UNC Aviation Services, Inc., Jerry Fox and Benny Revels, the following is a listing of parties to the proceedings in the United Court of Appeals for the Fifth Circuit:

Grumman Technical Services, Inc.
The Estate of Lamar Ishee
McDonnell Douglas Corporation
Jerome A. Kuechmann
Thomas Harden
Edwin E. Gennette
Mark Glasgow
David Callaghan
Grover Miley
Angela N. Ishee, individually and on behalf of Caitlin S. Ishee, a minor child

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

No. _____

GRUMMAN TECHNICAL SERVICES, INC. ET AL
PETITIONERS

V.

ESTATE OF LAMAR ISHEE, ET AL
RESPONDENTS

UNC Aviation Services, Inc., Jerry Fox and Benny Revels make their response in support of the petition for a writ of certiorari filed by Grumman Technical Services, Inc. to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

Opinions and orders of the United States Court of Appeals for the Fifth Circuit and opinions of the United States District Court for the Southern District of Mississippi referenced in the petition for a writ of certiorari filed by Grumman Technical Services, Inc. (referenced in the appendix of the petition filed by Grumman

Technical Services, Inc.).

JURISDICTION

UNC Aviation Services, Inc., Jerry Fox and Benny Revels make this response in support of the petition for a writ of certiorari from the judgment of the United States Court of Appeals for the Fifth Circuit, entered April 12, 1996. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1) and this response is filed pursuant to Rule 12, Supreme Court Rules.

STATUTORY PROVISIONS INVOLVED

Respondents, UNC Aviation Services, Inc., Jerry Fox and Benny Revels agree with the statutory provisions cited in the petition for a writ of certiorari of Grumman Technical Services, Inc.

STATEMENT OF THE CASE

A. Factual Background

Respondents, UNC Aviation Services, Inc., Jerry Fox and Benny Revels agree generally with the factual background presented in the petition for a writ of certiorari filed by Grumman

Technical Services, Inc. as well as the recitation of the proceedings below. Respondents provide the following additional factual background for a more complete presentation of their position.

UNC Aviation Services, Inc. provided intermediate-level maintenance on the subject TA-4J aircraft which included performance of work on the aircraft/support equipment and structural components not on the aircraft. Contractual agreements between UNC Aviation Services, Inc. and the United States set forth the scope of work performed and services provided by UNC Aviation Services, Inc. Further, UNC Aviation Services, Inc. and its personnel were subject not only to the specific provisions of contractual agreements, but also work was governed by the various manuals and other governmental instructions and directives as referenced by Grumman Technical Services, Inc. in its petition.

Respondents, UNC Aviation Services, Inc.,

Jerry Fox and Benny Revels were, as stated by Grumman Technical Services, Inc., "substitute sailors" (page 3, Grumman petition). Also, while not dispositive of issues in the court below, the only evidence before the court concerning the packing or repacking of the parachute provided to Captain Ishee, were parachute records and history records, positively showing that no one affiliated with UNC Aviation Services, Inc. had any contact with the parachute or ejection seat system prior to the accident in question.

B. Proceedings Below

UNC Aviation Services, Inc., Jerry Fox and Benny Revels agree with the statement of proceedings below set forth in the petition for a writ of certiorari filed by Grumman Technical Services, Inc. except to note that these parties joined in and/or participated in the response to the motion to remand, appeals and all reconsiderations thereof.

REASONS FOR GRANTING THE PETITION

To avoid unnecessary duplication, UNC Aviation Services, Inc. Jerry Fox and Benny Revels respond, stating their agreement with the reasons set forth by Grumman Technical Services, Inc. for the granting of the petition, more particularly enumerated in Sections I and II of the petition for writ of certiorari.

These respondents would, however, reaffirm to the court their response in support of the petition to further state that not only was the removal on their part appropriate, but that the denial of removal under 28 U.S.C. §1442(a) greatly limited the application of the government contract of defense, and inappropriately excluded this federal contractor and personnel from federal court. The need for relief in this court for UNC Aviation Services, Inc., Jerry Fox and Benny Revels is all the more heightened in view of the fact that naval personnel and/or others than these parties were affiliated with the performance or non-

performance of services which are/were attributed to these parties.

CONCLUSION

Respondents, UNC Aviation Services, Inc., Jerry Fox and Benny Revels hereby request that the petition for a writ of certiorari be granted and that they be afforded all such relief as may be appropriate and proper under the circumstances.

Respectfully submitted,

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Dated: July 24, 1996.